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IN THE

Supreme Court of the United States

October Term, 1962

No. 483

JOHN J. CASALE, INC.,

Appellant.

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

PETITION FOR REHEARING

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John J. Casale, Inc. (herein called "Appellant"), respectfully petitions, pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, for a rehearing of the judgment of the Supreme Court entered herein on December 17, 1962, which affirmed the decision of the United States District Court for the Southern District of New York. In support of the petition, Appellant respectfully shows and alleges:

I

This case involved the construction of three important sections of the Interstate Commerce Act (49 U. S. C. Section 303(a)(14), (15) and (17)); called for the resolution of the most crucial issue in the whole area of regulated transportation; and resulted in a subversion of the theory and practice of judicial review. By affirming the judgment, without opinion, the exiguous treatment of the identical issue in *United States* v. *Drum*, 368 U. S. 370

(1962), is rendered even more obscure than it was and is and the paralogism which characterizes the opinion of the Court below is plainly an erroneous gloss on the *Dram* case, *supra*. The affirmance, therefore, expands the reach of *Dram*, *supra*, so that the Interstate Commerce Commission (herein called the "Commission") is given a mandate to legislate standards at will and then to abandon them, secure in the knowledge that if an order is not supported by substantial evidence or grounded upon a proper principle of law, the three judge Court will reach into the judicial grab bag and extract the *Dram* case.

II

A review of this case, as it was heard and decided by the Commission shows that the "burden of transportation" test enunciated in the *Dram* case was never considered. Nevertheless, the Court below capriciously surmised that the Commission must have been guided by the *Dram* case, *supra*. But even if the Commission had the prescience to anticipate the reversal by this Court of the decision of the District Court of Oklahoma in the *Dram* case (193 F. Supp. 275, (1960)) the Commission improperly applied the principles of the case. Appellant did, indeed, meet the "burden of transportation" test as the Commission has defined it since the announcement of the *Dram* decision, *supra*. Thus, in *Verbel Transport, Inc., Investigation and Revocation of Certificate*, M. C. C. ——, 15 Fed. Carr. 35,541 (1962), the Commission held that a shipper was not engaged in private transportation despite the fact that the drivers were its direct employees and were transporting its goods in leased vehicles. The Commission concluded that an employer-employee relationship *per se* does not establish the "exclusive right of controlling the (transportation) operation" by a shipper. The opposite contention was ad

vanced by the Appellant, namely, that the absence of the classic type of employer-employee relationship does not establish *per se* that the shipper does not control the transportation or its essential incidents. The essence of the relationship between the Appellant and its lessees overwhelmingly proved that the lessee controlled the physical aspects of the transportation, the work of the drivers and assumed all of the financial burdens which are part and parcel of private carriage. These essential facts were not reviewed or evaluated by the Commission nor was the Commission accorded an opportunity to do so. If the Commission did rely upon the "burden of transportation" test, then it did not consider the underlying factors thereof and the Court below should have vacated the order and remanded the case to the Commission for consideration and review of the critical factors encompassed by the "burden of transportation" test. By failing to do so, and by this Court's affirmance, the Commission is given an administrative blank check and the law becomes what the Commission elects to say it is. Expertise does not cure constitutional infirmities nor invest administrative agencies with the power to construe statutes into new laws.

III

In affirming the judgment below this Honorable Court departed from settled principles (*United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); *United States v. Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Florida v. United States*, 282 U. S. 194 (1931)) which instruct that there must be a rational basis for an administrative determination so that its scope and meaning may be known to a reviewing court. If this case was governed by the *Bloom* case, then the self evident failure of the Commission to consider that case shows that there was no

rational basis for the decision and the order could have been sustained only by the wholly erroneous decision of the Court below to thrust the *Dixon* case upon the Commission and for the Court to pretend that the decision by the Commission rested squarely upon *Dixon*. This fictive arrangement makes a mockery of judicial review which this Court should not sanction.

IV

WHEREFORE, Appellant respectfully submits that a rehearing be granted and upon rehearing, jurisdiction should be noted in order that full argument may be had before this Honorable Court.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Appellant,
160 Broadway,
New York, New York.

Certificate

I hereby certify that this petition is presented in good faith and not for delay and I further certify that copies of this petition have been served on opposing counsel by depositing same in the United States mail on this the 25th day of February, 1963.

HERBERT BURSTEIN